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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207770
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No. 85453782

Mark: FLIP’N CHICKEN

Filed: October 22, 2011

Published: October 2, 2012

Fricker's Progressive Concepts, Inc.,

Opposer,

v.

Samar Haddad,

Applicant.

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Opposition No. 91207770

OPPOSER’S BRIEF

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OPPOSER’S BRIEF

I. Introduction

Samar Haddad (“Applicant”), a citizen of the United States residing in Charlotte, North Carolina, filed Application Serial No. 85453782 for FLIP’N CHICKEN (“Applicant’s mark”) on October 22, 2011, for restaurant services, restaurants featuring home delivery, and take-out restaurant services. The application includes a claim of first use and first use in commerce of July 15, 2011. Applicant’s mark was published for opposition on October 2, 2012.

Fricker’s Progressive Concepts, Inc. (“Opposer”), an Ohio corporation having its principal place of business in Miamisburg, Ohio, filed this opposition on October 17, 2012. Opposer claims prior use and registration of the marks FRICKIN’ CHICKEN, FRICKIN’, FRICKER’S and variations of these marks (“Opposer’s marks”) in connection with restaurant services and related goods and services. Opposer has alleged likelihood of confusion between Applicant’s mark and Opposer’s marks because they are similar in appearance, sound and

meaning, and because the services for which Applicant seeks registration of her mark are identical or closely related to the goods and services for which Opposer has used and registered its marks.

II. Description of the Record

The evidence of record consists of printouts of the electronic records for Opposer's Registration Nos. 1826515, 2156001, 3182929, 3038178, 2977151, 3182928, 1749070, 1942693, 3772455, 3344603, 3747089, 3531359 (1 TTABVUE 6-29) and 4608648 (15 TTABVUE 27); the Testimonial Affidavit of Louis J. Schirack for Fricker's Progressive Concepts, Inc. ("Schirack Affidavit", 15 TTABVUE 2-7) and Exhibits thereto, including a facsimile of Opposer's menu (15 TTABVUE 9-10), prints of pages from Opposer's website (15 TTABVUE 12-25), a copy of Opposer's Registration No. 4608648, which registration had not issued as of the filing date of the Notice of Opposition, and a printout of the electronic record therefor (15 TTABVUE 27-30), excerpts from the *Online Slang Dictionary* (15 TTABVUE 32-33, 39-40), excerpts from the *Urban Dictionary* (15 TTABVUE 34-37, 41-44), a facsimile of Applicant's menu (15 TTABVUE 46-47), printouts of pages from Applicant's website (15 TTABVUE 48-51), menus from Applicant's web site (15 TTABVUE 56-59) and Opposer's Notice of Reliance thereon (15 TTABVUE 52-53).

III. Recitation of Facts

For many years, and long prior to Applicant's claimed first use of her mark and the filing date of her application, Opposer has used and continues to use, the marks FRICKIN' CHICKEN, FRICKIN', FRICKER'S and variations thereof in connection with restaurant services and related goods and services. (Notice of Opposition, ¶3, 1 TTABVUE 2, and Applicant's Answer, ¶3,

stating that “Applicant has sufficient knowledge to accept allegations referring to registration of marks, length of use and connections to services and goods in paragraph 3 of the Notice of Opposition.” 6 TTABVUE 3.)

Opposer owns the following incontestable registrations.

FRICKIN’ CHICKEN, Reg. No. 1826515, based on an application filed April 12, 1993, and issued March 15, 1994, for chicken sandwiches for consumption on or off the premises.

FRICKIN’, Reg. No. 2156001, based on an application filed January 16, 1996, and issued May 12, 1998, for restaurant services.

FRICKIN’ Reg. No. 3182929, based on an application filed June 20, 2005, and issued December 12, 2006, for chicken wings; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of entrees, side dishes and appetizers consisting primarily of poultry and meat; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of chicken salads; sauces; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of entrees and side dishes consisting primarily of pasta or pasta salad; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of sandwiches and chicken sandwiches.

FRICKIN’ KILLER, Reg. No. 2977151, based on an application filed January 7, 2003, and issued July 26, 2005, for chicken wings; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of entrees, side dishes and appetizers consisting primarily of poultry and meat; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of chicken salads; sauces; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of consisting primarily of pasta or pasta salad; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature sandwiches and chicken sandwiches.

FRICKIN’ X-SCREAM, Reg. No. 3182928, based on an application filed June 20, 2005, and issued December 12, 2006, for sauces.

FRICKER’S, Reg. No. 1749070, based on an application filed May 15, 1992, and issued January 26, 1993, for restaurant services.



FRICKER'S and design, as shown above, Reg. No. 1942693, based on an application filed January 6, 1995, and issued December 19, 1995, for restaurant services.

(1 TTABVUE 6-21)

In addition, Opposer owns the following pertinent registrations:

FRICKIN' CHICKEN SLIDERS, Reg. No. 3772455, based on an application filed June 6, 2008, and issued April 6, 2010, for with restaurant menu items, namely, chicken sandwiches for consumption on or off the premises.

FRICKIN LICKIN LICIOUS, Reg. No. 3344603, based on an application filed December 5, 2002, and issued November 27, 2007, for prepared food, namely, restaurant menu items for consumption on and off the premises, namely, meat.

FRICKIN' KICKER, Reg. No. 3747089, based on an application filed January 7, 2003, and issued February 9, 2010, for chicken wings; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of entrees, side dishes and appetizers consisting primarily of poultry, or meat; sauces; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of prepared food for consumption on and off the premises, namely, sandwiches and chicken sandwiches.

FRICKIN' LITTLE KICKER, Reg. No. 3531359, filed January 7, 2003, and issued November 11, 2008, for chicken wings; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature of entrees, side dishes and appetizers consisting primarily of poultry and meat; sauces; prepared food for consumption on and off the premises, namely, restaurant menu items in the nature sandwiches and chicken sandwiches.

(1 TTABVUE 21-29)

The foregoing registrations were introduced into evidence in these proceedings by attachment of printouts from the electronic database records of the U.S. Patent and Trademark

Office, showing status and title, pursuant to 37 C.F.R. §2.122(d). (See also Applicant's Answer, ¶3, accepting Opposer's allegations as to the registration of Opposer's marks. 6 TTABVUE 3.)

IV. Issues

Because Applicant does not dispute Opposer's prior rights to and registrations of Opposer's marks, the only issue before the Board is whether there exists a likelihood of confusion between Applicant's mark and any one or more of Opposer's marks.

V. Summary of Opposer's Argument

Opposer contends that Applicant's mark, FLIP'N CHICKEN, is similar in appearance, sound and connotation to Opposer's mark FRICKIN' CHICKEN and others. Opposer further contends that the services identified in Applicant's application, namely, restaurant services, restaurants featuring home delivery and take-out restaurant services, are identical or closely related to the goods and services for which Opposer has used and registered its marks, including restaurant services, chicken wings, a variety of prepared foods for consumption on and off the premises, and other goods and services.

Opposer further contends that Applicant's goods and services and Opposer's goods and services are sold to the same customers. Applicant and Opposer both offer casual food services. Accordingly, members of the public are not likely to exercise a high degree of care in distinguishing between the parties' marks.

Finally, Opposer contends that, as a junior user and applicant, Applicant has a duty to refrain from use of a mark that is similar to Opposer's marks and apt to give rise to likelihood of confusion.

VII. Exposition of Opposer's Argument

A. *Applicant's Mark is Similar in Appearance, Sound and Connotation to Opposer's Marks*

Applicant's mark comprises the words FLIP'N CHICKEN. Opposer's marks consist of the words FRICKIN' CHICKEN, FRICKIN', FRICKER'S and others.

Applicant's mark, FLIP'N CHICKEN, is very similar in appearance, sound and connotation to Opposer's mark, FRICKIN' CHICKEN, as well as Opposer's other pleaded marks incorporating plays on the surname FRICK. The first and most distinctive element of both FRICKIN' CHICKEN and FLIP'N CHICKEN consists of a two-syllable word, the first syllable of which begins with the letter "F" and incorporates a short "i" sound, and the second syllable of which is pronounced "ən." The visual similarity of the marks is further heightened by their use of apostrophes.

Comparing Opposer's FRICKIN' CHICKEN mark to Applicant's FLIP'N CHICKEN Mark, the second word of each mark is the generic term CHICKEN. The marks appear to be similar in the context of a side-by-side comparison, below.

FLIP'N CHICKEN
FRICKIN' CHICKEN

Likelihood of confusion between these marks can only be exacerbated where consumers do not have the opportunity to make a side-by-side comparison in the marketplace.

The words FLIP'N and FRICKIN' comprise the most distinctive elements of the parties' respective marks. They are very similar in connotation. Opposer's marks FRICKIN, FRICKIN' CHICKEN, FRICKER'S and other pleaded marks were derived from the surnames of Opposer's founders, brothers Raymond and Robert Frick. However, the words "Frick" and "Frickin" are also commonly used as euphemisms for a vulgar slang term, the infamous "F" word. (Schirack

Affidavit, ¶9 and Exhibit 4 thereto, comprising an excerpt from the *Urban Dictionary*. 15 TTABVUE 5, 31-37.) In naming their first restaurant, the Frick brothers utilized the dual meaning associated with “Frick” as both a surname and oath. In subsequent years, Opposer expanded its use of variations of “Frick” to create an amusing and memorable collection of marks.

In addition to the visual and aural similarity of FLIP’N and FRICKIN’, the word FLIP’N has a similar connotation as a slang term, used interchangeably or as a substitute for FRICKIN’. (Schirack Affidavit, ¶9, and Exhibit 5 thereto, comprising excerpts from *The Online Slang Dictionary* and the *Urban Dictionary*, 15 TTABVUE 5, 38-44.)

B. *Applicant’s Services Are Identical to Opposer’s Services, and are Sold into Similar Channels of Trade*

Opposer owns, operates and franchises restaurants in Ohio, Indiana and Michigan, for which it uses the FRICKER’S mark. Since the founding of FRICKER’S restaurants in 1985, Opposer has used and continues to use the trademarks and service marks FRICKIN’ CHICKEN, FRICKIN’, FRICKER’S and variations in connection with restaurant and bar services, carryout services, and related goods and services. (Schirack Affidavit, ¶¶4-5, 15 TTABVUE 3) The FRICKER’S menu is varied, but FRICKER’S’ signature dishes feature chicken, particularly chicken wings. (Schirack Affidavit, ¶¶ 1, 3, and Exhibits 1 and 2 thereto, comprising copies of FRICKER’S carryout menu and printouts from the FRICKER’S web site, www.frickers.com, showing menu items available for in-restaurant dining and carryout. 15 TTABVUE 2, 7-25.) FRICKER’S restaurants cater to families and the dining out public.

Opposer owns numerous federal trademark registrations for its marks, including those set forth in the recitation of facts, plus Reg. No. 4608648, issued September 23, 2014, for FRICKIN’

CHICKEN for prepared food for consumption on and off the premises in the nature of restaurant menu items, namely, chicken wings, chicken chunks, chicken salad, and dips for chicken wings and chicken chunks; prepared food for consumption on and off the premises in the nature of restaurant menu items, namely, chicken sandwiches, wraps, nachos, quesadillas, pizza, and ravioli. (Schirack Affidavit, ¶¶5-6, 15 TTABVUE 3-4, 27-30). Opposer has used all of its registered marks continuously at FRICKER'S restaurants since the dates recited in the registrations, and all of the registered marks are currently in use. (Schirack Affidavit, ¶7, 15 TTABVUE 3).

As may be seen from the pages from Applicant's web site and the copy of Applicant's menu submitted with Opposer's testimony (Schirack Affidavit, ¶10, Opposer's Notice of Reliance, and Exhibit 7 thereto, 15 TTABVUE 5, 52-59), Applicant also offers restaurant and carry-out services featuring chicken, particularly chicken wings, and assorted sides.

The foregoing evidence shows that Opposer and Applicant offer similar casual restaurant and carry-out services featuring chicken wings and other chicken dishes, at modest prices. Where marks are used in connection with identical goods or services, as in the case of Opposer's marks and Applicant's mark, the degree of similarity of the marks necessary to a finding of likelihood of confusion is less than that required to show a likelihood of confusion between marks used for merely related goods or services. *Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.*, 101 U.S.P.Q.2d 1163, 1173 (T.T.A.B. 2011)(CLASSIC AMERICAN BLEND was held to be confusingly similar to CLASSIC CANADIAN, where both marks were used in connection with tobacco products); *Bridgestone Americas Tire Operations, LLC v. Federal Corp.*, 673 F.3d 1330, 1337, 102 U.S.P.Q.2d 1061 (Fed. Cir. 2012)(MILANZA held confusingly

similar to POTENZA and TURANZA, where both marks used in connection with tires); *Gunter v. Howard D. Johnson Co.*, 161 U.S.P.Q. 233 (T.T.A.B. 1969)(HO-KO for soft drinks held to be confusingly similar to HO JO, HOJO and HOJO'S for restaurant services and menu items).

In this case, Applicant's mark differs from Opposer's mark by only two consonants, and is pronounced very similarly to Opposer's mark. In *In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041, 1042 (T.T.A.B. 1988), holding that Applicant's mark TRUCOOL for a synthetic coolant for use in the metal working industry for machining operations was confusingly similar to the previously registered mark, TURCOOL, for cutting oil, the Board stated that,

Even assuming arguendo that applicant is correct that TURCOOL and TRUCOOL are different in meaning or connotation, and further assuming arguendo that there is some dissimilarity in sound when the two marks are properly pronounced, the marks TURCOOL and TRUCOOL are so similar in appearance that, under the facts of this case, this alone would cause a likelihood of confusion. When the goods are identical or closely related as they are here, it has been held that: "Concerning the question of similarity of the marks, it is well established that similarity in any one of the elements of sound, appearance, or meaning is sufficient to indicate likelihood of confusion." (quoting *General Foods Corp. v. Wisconsin Bottling, Inc.* 190 U.S.P.Q. 43, 45 (T.T.A.B. 1976)).

Like the mark at issue in *Lamson*, Applicant's mark FLIP'N CHICKEN differs from Opposer's mark FRICKIN' CHICKEN by only a few letters, which make very little difference to the pronunciation of the marks. Moreover, notwithstanding this spelling variation, as discussed above, Applicant's and Opposer's marks have very similar connotations in popular slang. Given the similarities between Opposer's marks and Applicant's mark, the fact that they offer identical services weighs heavily in favor of a finding that they are confusingly similar.

C. *Members of the Public are not Likely to Exercise a High Degree of Care in Discriminating between the Parties' Marks*

Both Opposer and Applicant offer restaurant services featuring chicken wings and other chicken dishes. Both parties' restaurants feature casual fare and provide carry-out at relatively low prices. Patrons of restaurants such as these are not likely to invest time or attention in discriminating between very similar marks used in connection with such services, considering that they are primarily seeking casual, inexpensive foodservice, specifically chicken wings and other chicken entrees. The similarity in appearance, sound and connotation of the parties' marks are likely to lead to confusion and mistake regarding the source of Applicant's goods and services.

In *Eveready Battery Company, Inc. v. Green Planet, Inc.*, 91 U.S.P.Q.2d 1511 (T.T.A.B. 2009), the Board determined that the Applicant's mark, SLICK ULTRA PLUS for disposable razors was confusingly similar to SCHICK for razors and razor blades. The Board noted that SLICK was the dominant element of the applicant's mark, and was highly similar to the opposer's well known SCHICK mark. The Board stated that the differences between the words were not likely to be noticed by consumers who buy razor blades (an inexpensive item purchased without great care) and whose familiarity with the SCHICK trademark might lead them to misread SLICK at a glance.

Although the fame of Opposer's mark is not a factor before the Board in this case, the facts of this case are comparable to those in *Eveready*: Opposer's marks and Applicant's mark are distinguishable in only minor respects; Opposer and Applicant both offer casual dining; and their marks are likely to be taken in at a glance by patrons.

The marks at issue are comparable to BEER NUTS and BREW NUTS, considered by the Court in *Beer Nuts v. Clover Club Foods Co.*, 805 F.2d 920, 231 U.S.P.Q. 913 (10th Cir 1986). In that case, the Court found the marks to be confusingly similar in view of their similarity in appearance, sound and connotation, the fact that the parties' goods (salted, sweetened nuts) were identical, and the fact that consumers were apt to exercise little care when purchasing the goods.

As in *Beer Nuts*, Opposer's mark differs from Applicant's mark by only a few letters, which distinguish the pronunciation of the marks only slightly. FLIP'N CHICKEN and FRICKIN' CHICKEN both end with a generic term that identifies their respective products. Because of the similarity between Applicant's and Opposer's marks, the identical nature of the goods and services offered under the marks, and the tendency among consumers casually to purchase quick and inexpensive foods items, Opposer submits that consumers are apt to exercise little care in discriminating between the parties' marks.

D. *As Junior User, the Applicant Has a Duty to Refrain from Use of a Mark Similar to Opposer's Marks*

Applicant also has a responsibility to avoid confusion with Opposer's marks, and has failed to do so by adopting a mark similar in appearance, sound and connotation to Opposer's marks. However, Applicant has adopted a mark similar to Opposer's mark in almost every respect.

As the court noted in *Bridgstone, supra*, "[a]lthough the opposer bears the burden of coming forward with sufficient evidence (of likelihood of confusion), a new entrant presenting a new mark for registration has an obligation to avoid confusion with established marks in the same market," quoting the court's statement in *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002): "[t]his court resolves doubts about

the likelihood of confusion against the newcomer because the newcomer has the opportunity and the obligation to avoid confusion with existing marks.” As the Board noted in *Hard Rock Café International (USA), Inc. v. Elsea*, 56 U.S.P.Q.2d 1504, 1514 (T.T.A.B. 2000), “[i]t is a well-established principle that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and any doubt as to likelihood of confusion must be resolved against the newcomer and in favor of the prior user or registrant.” (COUNTRY ROCK CAFÉ deemed confusingly similar to HARD ROCK CAFÉ.)

Because Applicant is charged with constructive notice of Opposer’s registered marks and, moreover, has admitted that she has sufficient knowledge to accept Opposer’s allegations regarding its registered marks, length of use of its marks, and goods and services offered by Opposer (6 TTABVUE 3), Applicant is obligated to select a mark that is clearly distinguishable from Opposer’s prior used marks.

VII. Conclusion

Opposer submits that Applicant’s mark, FLIP’N CHICKEN, for use in connection with restaurant services, restaurants featuring home delivery and take-out restaurant services, is likely to be confused with Opposer’s marks FRICKIN’ CHICKEN, FRICKIN’, FRICKER’S and Opposer’s other pleaded marks, used and registered in connection with restaurant services and related goods and services. Applicant’s mark is similar in appearance, sound and connotation to Opposer’s marks, and is similarly evocative of a common epithet.

Applicant seeks registration of her mark in connection with goods and services identical or closely related to the goods and services for which Opposer has used and registered its marks. The parties’ restaurant services are offered to the same kinds of customers. Members of the

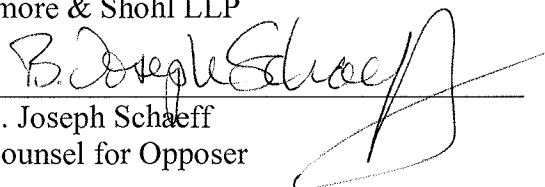
public are not likely to exercise a high degree of care in discriminating between the parties' marks, given their use in connection with casual food, specifically chicken wings and other chicken dishes.

Finally, Opposer submits that Applicant, as junior user, has a duty to select a mark that is clearly distinct from Opposer's well-established and previously registered marks.

For reasons set forth above, Applicant requests that registration of Applicant's mark be refused.

Respectfully submitted,
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CERTIFICATE OF FILING - ESTTA

I hereby certify that this Brief for Opposer is being filed with the Trademark Trial and Appeal Board using the United States Patent and Trademark Office ESTTA website this 17th day of November, 2015.

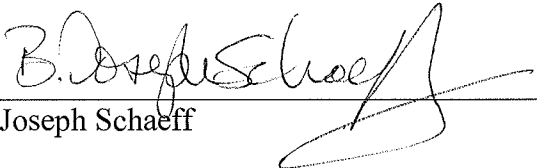

B. Joseph Schaeff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Opposer was served upon Applicant by email and first class U.S. mail, postage prepaid, addressed to:

Samar Haddad
7629A Pineville-Matthews Rd.
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this 17th day of November, 2015.


B. Joseph Schaeff